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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY, INC., Plaintiff, v. DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, KESSLER'S FLYING CIRCUS, THUNDERWOOD HOLDINGS, INC., TODD DUNNING, DUNNING ENTERPRISE, INC., BRIAN DUNNING, BRIANDUNNING.COM, and DOES 1-20, Defendants.	CASE NO.: CV-08-4052 JF **DECLARATION OF STEWART H. FOREMAN IN SUPPORT OF DEFENDANTS TODD DUNNING AND DUNNING ENTERPRISE, INC.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT AND TO TRANSFER VENUE** Date: June 26, 2009 Time: 9:00 a.m. Place: Courtroom 3, 5th Floor 280 South First Street San Jose, CA 95113

I, Stewart H. Foreman, declare:

1. I am a member of the Bar of the State of California and I am admitted to practice before this Court. I am a partner in the firm of Freeland Cooper and Foreman LLP, 150 Spear Street, Suite 1800, San Francisco, California 94105. I am counsel for defendants Todd Dunning and Dunning Enterprise, Inc. in this matter.

2. I have personal knowledge of the facts contained in this Declaration and I am competent to testify to these facts.

3. The documents referenced in this Declaration are submitted in support of the moving parties' motion to change venue under Fed. Rule Civ. Proc. 12(b)(3) and to transfer venue under 28 U.S.C. § 1404(a).

4. Attached hereto and incorporated by reference herein as Exhibit 1 is a true and correct copy of the Publisher Service Agreement issued by Commission Junction, Inc. as of June 18, 2005. This document was referenced and relied on by this Court in its Order dated February 24, 2009, dismissing the First Amended Complaint under Fed. R. Civ. Proc. 12(b)(3). This document was produced by Commission Junction, Inc. in the State Court Action with document identification numbers 0000636-646.

5. Attached hereto and incorporated by reference herein as Exhibit 2 is a true and correct copy of documents entitled eBay Affiliate Program-Supplemental Terms and Conditions dated November 2004, October 1, 2005, and June 2007. By their terms, these documents are incorporated by reference into the Commission Junction Publisher Service Agreement, although these documents were prepared by eBay, Inc. and state they are applicable to parties participating in eBay's Affiliate Marketing Program ("AMP"). These documents were produced by Commission Junction, Inc. in connection with the case of *Commission Junction, Inc. v. Thunderwood Holdings, Inc. et. al.* Case No. 30-2008-00101025 ("State Court Action") that was pending in the Superior Court of the State of California, County of Orange, Central Branch, against these defendants (except for Briandunning.com). These documents were produced by Commission Junction, Inc. in the State Court Action with document numbers 0000636-52.

6. Attached hereto and incorporated by reference herein as Exhibit 3 is the Master Advertiser Service Agreement as of January 1, 2006, between eBay and Commission Junction, Inc. This document was produced by Commission Junction, Inc. in the State Court Action with document identification numbers 00784-819.

7. Exhibits 1 through 3 are the documents produced by Commission Junction, Inc. which purport to describe the relationship among Commission Junction, Inc., eBay, Inc. and these defendants related to eBay's AMP. None of these documents contain any provision purporting to

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provide these defendants' consent to venue in this federal district court. Commission Junction, Inc. identified these documents and provided them as trial exhibits in the State Court Action.

8. Attached hereto and incorporated by reference as Exhibit 4 is a true and correct copy of the User Agreement that I printed from the eBay website on October 22, 2008. By its terms, it was effective on August 13, 2008, which is 12 days before this lawsuit was filed. This document states, under the heading "Resolution of Disputes/Law and Forum for Disputes" that "You agree that any claim or dispute *you may have against eBay* must be resolved by a court located in Santa Clara County." There is no forum selection clause in this document that is binding on a defendant when eBay files a lawsuit. Also, this User Agreement does not reference eBay's AMP. I previously requested from David Eberhart, counsel for eBay, a copy of the User Agreement referenced in eBay's complaint. He declined to provide me with a copy and no User Agreement has been attached to the Second Amended Complaint.

9. On or about March 12, 2008, in the State Court Action, defendant Brian Dunning served on eBay a Deposition Subpoena for Production of Business Records. A true and correct copy of this subpoena is attached hereto and incorporated by reference herein as Exhibit 5. eBay produced documents in response to this subpoena, although many were improperly redacted so as to be unintelligible. The subpoena requested many categories of documents including those showing communications between eBay and CJI about Kessler's business practices, software, and its relationship to eBay and CJI.

10. Prior to the commencement of the trial of the State Court Action, CJI filed "Plaintiff/Cross-Defendant Commission Junction, Inc.'s Witness List" dated March 2, 2009. This list identified 24 current or former CJI employees as witnesses in the State Court Action related to alleged breaches of the PSA, including alleged "cookie-stuffing". All these witnesses except for 3 are identified as residing in Southern California. Based on the documents and other evidence in the State Court Action, it is apparent that most, if not all, of these witnesses have evidence bearing on eBay's allegations about cookie stuffing, operation of the PSA, and related topics, all central to the issues, claims and defenses in this lawsuit. Because no depositions were taken in the State Court Action, the TD Defendants do not know precisely what these witnesses will testify about. However, the similarity

of the issues and evidence in the State Court Action and this case indicates that these witnesses will have evidence germane to this lawsuit.

I declare under penalty of perjury under the laws of the State of California and the laws of the United States that the foregoing is true and correct.

Executed on the 27th day of April, 2009 at San Francisco, California.

/s/
Stewart H. Foreman

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